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Manitoba has long been recognized as a leader in changing the law to reflect evolving relationships in the modern family.

In 1978, Manitoba passed The Marital Property Act making the division of marital property more equitable when a marriage dissolved through separation or divorce and The Family Maintenance Act to deal with such questions as financial support, custody and access when a couple separates.

As well, Manitoba has pioneered innovations in the administration of justice as it relates to family matters. The first Maintenance Enforcement Program in Canada was established in our province in 1980. This program which monitors and enforces maintenance and support payments has become a model for the rest of Canada.

In 1984, a unified family court system, consisting of the Family Division of the Court of Queen's Bench and the Family Conciliation program, was created to deal with domestic and family matters. Initially operating only in Winnipeg, St. Boniface, and Selkirk, this court uses mediation, assessment services, and informal settings to reduce the hostility and stress that too often result from traditional adversarial court appearances.

Our government is determined to continue Manitoba's record of leadership and innovation in this area.

Last year, we passed legislation to create the first access assistance program in Canada. This program assists parents who are having difficulties exercising their access rights. As well, our government has been proud to expand the unified family court to all of Manitoba.

After long and detailed consultation with interested groups and individuals throughout Manitoba as well as careful consideration of recent judicial decisions and recommendations made by the Law Reform Commission, we have prepared a series of legislative changes.

In an area as important and sensitive as family law, it is vital that the government receive the comments of all who are affected by the proposed changes. For that reason, this information booklet is being made available. You are encouraged to make your views known. Submissions should be addressed to:

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Yours sincerely,

Jim McCrae

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EXPLANATION PAPER:
THE DEPENDANTS RELIEF ACT

THE DEPENDANTS RELIEF ACT

The Bill repeals and replaces the existing Testators Family Maintenance Act. The major changes that are provided for by this Bill are as follows:

1. The Moral Duty is replaced by a financial dependency test.

The present Act has been interpreted by the Courts as having its primary purpose the enforcement of a moral duty of the testator towards his or her family. The Courts have looked at the conduct and character of the applicant as well as whether he or she is dependent. Successful applicants under The Testators Family Maintenance Act are not always dependent on the deceased. For example, able-bodied financially independent children over 18 have succeeded on the basis of the "moral duty" test.

This Bill changes the thrust of the legislation by restricting applicants to those who are truly dependent and who do not have reasonable provisions for maintenance and support either from the estate of the deceased or otherwise.

The purpose of the new Act is to transfer the legal support obligation owed by a deceased during life to the estate of the deceased where a dependant is without reasonable provision for maintenance and support. The Bill provides that the financial needs of the dependant are the primary consideration in determining whether an order should be granted.

2. Classes of Eligible Dependants are expanded.

At present, The Testators Family Maintenance Act restricts application for relief by defining dependant to mean a spouse, a child, or a common-law spouse under certain restricted circumstances.

The Bill also includes the following classes of eligible applicants as dependants:

(1) A former spouse who has a maintenance order or agreement subsisting at the time of the deceased's death.

(2) A grandchild, parent, grandparent or sibling who was substantially dependent on the deceased at the time of death.

(3) A child over the age of 18 who was substantially dependent on the deceased at the time of the deceased's death.

(4) A child to whom the deceased stood in the place of a parent at the time of the deceased's death (in loco parentis). The obligation is secondary to that of the child's parents and is an obligation only to the extent that the parents fail to provide reasonably for the child's support, maintenance or education.

In addition, the Bill allows the Minister responsible for The Social Allowances Act to apply for an order of support on behalf of a dependant who is in receipt of social allowances benefits.

3. The Bill provides for a conflict of laws scheme to govern in situations where a deceased dies in one jurisdiction, with property located in another.

4. The Bill gives the Court the power to make interim orders, as well as orders for the discharge, suspension, reduction or increase of an existing order.

5. The Bill provides a supplement to an estate property sharing regime. At present, The Testators Family Maintenance Act provides that a surviving spouse who first applies for maintenance under The Testators Family Maintenance Act rather than applying for the fixed share of the deceased's estate under The Dower Act, loses the right to elect under The Dower Act. The Testators Family Maintenance Act does not supplement The Dower Act — rather it operates as a set-off. The new Dependants Relief Act will operate as a supplement to The Dower Act, rather than as a set-off.

PROPOSED DEPENDANTS RELIEF ACT

Definitions

1 In this Act,

"child" includes

(a) a child conceived before and born alive after the parent's death, and

(b) a child to whom the deceased stood in loco parentis at the time of the deceased's death, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"court" means the Court of Queen's Bench;

"dependant" means

(a) the spouse of the deceased,

(b) a person divorced from the deceased or whose marriage to the deceased was declared a nullity, in whose favour an order or agreement for maintenance and support was subsisting at the time of the deceased's death,

(c) a person of the opposite sex to the deceased not legally married to the deceased who

(i) cohabited with the deceased continuously for a period of not less than 5 years in a relationship in which the survivor was substantially dependant on the deceased, if

(A) cohabitation was subsisting at the deceased's death, or

(B) cohabitation was not subsisting but had ceased within one year of the deceased's death,

(ii) cohabited with the deceased continuously for not less than one year if there is a child of the union, and if

(A) cohabitation was subsisting at the deceased's death, or

COMMENTS

No change in policy from present *Testators Family Maintenance Act.*

New. Provides consistency with *The Family Maintenance Act*, by making the obligation upon death consistent with the obligation during life towards a child whom a person treated as one's own.

No change from the present *Testators Family Maintenance Act.*

List of dependants who may qualify for relief under act is set out.

Present Act provides for spouse.

New. Would allow a former spouse who has a maintenance order or agreement that was subsisting at the time of the death of the deceased to apply as a dependant.

No change from the present *Testators Family Maintenance Act.*

There is no change from the present *Testators Family Maintenance Act.*

Allows application if cohabitation ceased within one year of the deceased's death.

There is no change from the present *Testators Family Maintenance Act.*

There is no change from the present *Testators Family Maintenance Act.*

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
(B) cohabitation was not subsisting but had ceased within one year of the deceased's death,	Allows application where cohabitation ceased within one year of deceased's death.
(iii) was being paid or entitled to be paid maintenance and support by the deceased under an agreement or a court order at the time of the deceased's death,	There is no change from the present *Testators Family Maintenance Act*.
(d) a child of the deceased	The present *Testators Family Maintenance Act* allows any child to bring an application for relief. This has resulted in able-bodied financially independent adult children receiving awards under the Act, based on a moral duty. The proposed new scheme eliminates the moral duty and replaces it with a financial dependency test by restricting the definition of child.
(i) who was under the age of 18 years at the time of deceased's death,	
(ii) who, by reason of illness, disability or other cause was, at the time of the deceased's death, unable to withdraw from the charge of the deceased or to provided himself or herself with the necessaries of life, or	
(iii) who was substantially dependant on the deceased at the time of the deceased's death,	
(e) a grandchild of the deceased who was substantially dependant on the deceased at the time of the deceased's death;	New. Provides under what circumstances a grandchild may apply for relief.
(f) a parent or grandparent of the deceased who was substantially dependant on the deceased at the time of the deceased's death;	New. Provides under what circumstances a parent or grandparent may apply for relief.
(g) a brother or sister of the deceased, whether related to the deceased by the whole blood or the half blood, who was substantially dependant on the deceased at the time of the deceased's death;	New. Provides under what circumstances a sibling, related by whole or half blood, may apply for relief.
"personal representative" means an executor, an administrator or an administrator with will annexed;	No change from existing *Testators Family Maintenance Act*.
"spouse" means either of a man or woman who	New. Provides definition for a spouse.
(a) are married to each other, or	
(b) have entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.	

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
Reasonable provision for dependant 2(1) If it appears to the court that a dependant is in financial need, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.	New. Changes the thrust of the legislation from the present test of moral duty of the deceased towards the dependant to a financial needs test of the dependant.
Act applies if deceased testate or intestate 2(2) An order may be made under subsection (1) whether the deceased died testate or intestate and notwithstanding the provisions of the deceased's will or The Intestate Succession Act.	No change in policy from present *Testators Family Maintenance Act.*
Support determined at date of hearing 2(3) The reasonableness of provision for maintenance and support shall be determined as of the date of the hearing of the application.	New. The relevant date for determining the award and the need of the dependant is the date of the hearing.
Order suspending administration 3 On an application by or on behalf of a dependant, the court may make an order suspending in whole or in part the administration of the deceased's estate, for such time and to such extent as the court may decide.	No change in policy from the present *Testators Family Maintenance Act.*
Application on behalf of all dependants 4 An application for an order under section 2 may be dealt with by the court as an application made on behalf of all persons who might apply, and in so far as the limitation period referred to in section 7 is concerned, shall be deemed to be an application on behalf of all persons who might apply.	No change in policy from the present *Testators Family Maintenance Act.*
Application in respect of social allowance recipient 5 If the government is providing a social allowance in respect of a dependant under The Social Allowances Act, the minister charged with the administration of that Act may apply for an order of provision for maintenance and support of the dependant.	New. Allows the Minister responsible for *The Social Allowances Act* to apply for an order for support on behalf of a dependant who is in receipt of social allowance benefits.
Service on a Public trustee 6 If a dependant or a person who is entitled under the deceased's will or under The Intestate Succession Act is	No change in policy from the present *Testators Family Maintenance Act.*

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
(a) a minor; or (b) a mentally disordered person or a person incompetent to manage his or her affairs within the meaning of The Mental Health Act; notice of an application under section 2 shall in every case be served on the Public Trustee, who has the right to appear and be heard upon the application.	No change in policy from the present *Testators Family Maintenance Act.*
Limitation period 7(1) In this section, "limitation period" means a period of time not later than six months from the grant of letters probate of a will or of letters of administration.	No change in policy from the present *Testators Family Maintenance Act.*
Application within limitation period 7(2) Except as provided in subsection (3), no application for an order under section 2 may be made after the expiry of the limitation period.	No change in policy from the present *Testators Family Maintenance Act.*
Exception 7(3) The court may allow an application to be made at any time as to the portion of the estate remaining undistributed at the date notice of the application is served on the personal representative if the court is satisfied that,	No change in policy from the present *Testators Family Maintenance Act.*
(a) the dependant did not know of the death of the deceased until after the expiry of the limitation period;	No change in policy from the present *Testators Family Maintenance Act.*
(b) the dependant's need for maintenance and support did not arise until after the expiry of the limitation period; or	No change in policy from the present *Testators Family Maintenance Act.*
(c) circumstances beyond the control of the dependant prevented the dependant from making an application within the limitation period.	No change in policy from the present *Testators Family Maintenance Act.*
Distribution stayed 8(1) When an application is made for an order of provision and notice of it is served on the personal representative of the deceased, the personal representative shall not, after service of the notice, unless all persons entitled to apply under this Act consent or the court otherwise orders, proceed with the distribution of the estate until the court has disposed of the application.	Provides that a personal representative may not proceed with the distribution of an estate when an application is made under the Act and notice is served on the personal representative.

PROPOSED DEPENDANTS RELIEF ACT

Exception

8(2) Nothing in this Act prevents a personal representative from making advances in order to provide things immediately necessary for the maintenance and support of dependants who are entitled under the deceased's will or under The Intestate Succession Act.

Liability of personal representative

8(3) If a personal representative distributes a portion of the estate in violation of this section and any provision for maintenance and support is ordered by the court to be made out of the estate, the personal representative is personally liable to pay the amount of the distribution to the extent that the provision or any part of it ought, under the order or this Act, to be made out of the portion of the estate distributed.

Determination of amount

9(1) In determining the amount and duration, if any, of maintenance and support, the court shall have regard primarily to the financial needs of the dependant and shall consider all of the circumstances of the application, including,

(a) the size and nature of the deceased's estate;

(b) the assets and financial resources that the dependant has or is likely to have in the foreseeable future;

(c) the measures available for a dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(d) the age and the physical and mental health of the dependant;

(e) the capacity of the dependant to provide for his or her own support;

(f) if the dependant is a spouse, any distribution or division of property that the dependant has received or is entitled to receive under The Dower Act or The Marital Property Act;

COMMENTS

COMMENTS

New. Allows advances where there is an entitlement in law or through a will to provide for the immediate needs necessary for the maintenance of the dependant.

New. Provides when a personal representative would be personally liable for distribution of a portion of the estate in violation of the section.

New. Sets out criteria for a court in determining the amount and duration of the order, with the primary consideration being the financial needs of the dependant.

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
(g) the assets that the dependant is entitled to receive from the estate of the deceased otherwise than by an order under this Act; (h) the claims that any other dependant or any other person has upon the estate; (i) any provision which the deceased while living made for the dependant and for any other dependants; (j) if the dependant is a child, the child's aptitude for and reasonable prospects of obtaining an education; (k) if the dependant is a child to whom the deceased stood in loco parentis, the primary obligation of the child's parent to maintain the child and whether the parents have discharged that obligation.	
Evidence 9(2) On the hearing of an application, the court (a) may inquire into and consider all matters that it considers should fairly be taken into account in deciding the application;	New provision. Gives the court the power to hear all relevant evidence.
(b) may in addition to the evidence presented by the parties direct any other evidence to be given that it considers necessary or proper;	New. Gives the court the power to direct any other evidence that it considers necessary or proper.
(c) may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, (i) for making the disposition in his or her will, or (ii) for not making reasonable provision for a dependant, including any statement in writing signed by the deceased.	No change in policy from the present *Testators Family Maintenance Act*.
Weight to be given to dependant's reasons 9(3) In estimating the weight to be given to a statement referred to in clause (2)(c), the court shall consider all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement.	No change in policy from the present *Testators Family Maintenance Act*.

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
Order of provision for maintenance and support 10(1) In an order making provision for a dependant, the court may impose such conditions and restrictions as it considers appropriate and may give such directions as it considers necessary to give effect to the order.	No change in policy from the present *Testators Family Maintenance Act*.
Kinds of orders 10(2) Provision may be made out of income or capital, or both, and an order may be made in one or more of the following ways:	No change in policy from the present *Testators Family Maintenance Act*.
(a) an amount payable annually or otherwise, whether for an indefinite or limited period, or until the happening of a specified event;	No change in policy from the present *Testators Family Maintenance Act*.
(b) a lump sum to be paid or held in trust;	No change in policy from the present *Testators Family Maintenance Act*.
(c) specified property to be transferred or assigned to or held in trust for the benefit of the dependant, whether absolute, for life or for a term of years;	No change in policy from the present *Testators Family Maintenance Act*.
(d) the possession or use of specified property by the dependant for life or such period as the court considers appropriate;	New. Allows the court to order that a dependant has the right to possess or use specified property for the dependant's life or for a specified time period.
(e) the securing of payment under an order by a charge on property or otherwise;	New. Allows for the securing of payment under the order by a charge on property.
(f) the payment to the minister charged with the administration of The Social Allowances Act of an amount in reimbursement for a social allowance provided in respect of a dependant after the deceased's death; and	New. Allows for an order to be made payable to the Minister responsible for *The Social Allowances Act* as reimbursement where a dependant is in receipt of social allowances after the deceased's death.
(g) in any other way that the court considers appropriate.	New. Gives the court discretion to make an order in any way that it considers appropriate.
Transfer of assignment of property 10(3) When a transfer or assignment of property is ordered, the court	No change in policy from the present *Testators Family Maintenance Act*.
(a) may give all necessary directions for the execution of the transfer or assignment by the deceased's personal representative or such other person as the court may direct; or	No change in policy from the present *Testators Family Maintenance Act*.

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
(b) may grant a vesting order.	
Notice 10(4) The court shall not make an order under this section until it is satisfied that all persons who are or may be affected by the order have been served with notice of the application as provided by the rules of court, and every such person is entitled to be present and to be heard in person or by counsel at the hearing.	No change in policy from the present *Testators Family Maintenance Act.* New. Requires that all persons who are and may be affected by an order must be served with notice of the application and that every person entitled to notice has a right to be present and be heard at the hearing.
Exception 10(5) Despite subsection (4), if in the opinion of the court (a) every reasonable effort has been made to serve those entitled to notice; or (b) after every reasonable effort has been made, it is not possible to identify one or more of the persons entitled to notice; the court may dispense with the requirement of notice in respect of any person who has not been served.	New. Sets out when the court has discretion to dispense with the notice requirement.
Further powers of court 11 If an order making provision for maintenance and support falls upon a portion of the estate to which a person would, apart from that order, be entitled under the deceased's will or under The Intestate Succession Act, the court may	No change in policy from the present *Testators Family Maintenance Act.*
(a) fix a periodic payment or lump sum to be paid by the person to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which that person is interested;	No change in policy from the present *Testators Family Maintenance Act.*
(b) relieve such portion of the estate from further liability; and	No change in policy from the present *Testators Family Maintenance Act.*
(c) direct (i) the manner in which the periodic payment is to be secured, or (ii) to whom the lump sum is to be paid and the manner in which it is to be dealt with for the benefit of the person to whom the commuted payment is payable.	No change in policy from the present *Testators Family Maintenance Act.*

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
Interim order 12(1) When an application is made under this Act and it appears to the court that the applicant is in immediate need of financial assistance, but the matters referred to in sections 9 and 10 have not been ascertained by the court, the court may make such interim order of provision for maintenance and support as it considers appropriate.	New. Gives the court the power to make interim orders where the applicant is in immediate need of financial assistance.
Service on personal representative 12(2) The court shall not make an order under subsection (1) unless the deceased's personal representative has been served with notice of the application for interim relief.	New. Requires service of notice of the application for an interim order on the personal representative.
Incidence of provision ordered 13(1) Subject to subsection (2), the incidence of any provision for maintenance and support ordered shall (a) be borne by the persons entitled to the deceased's estate in proportion to the value of their respective interests in the estate; and	No change in policy from the present *Testators Family Maintenance Act.*
(b) be in respect of that part of the deceased's estate to which the jurisdiction of the court extends under section 14.	No change in policy from the present *Testators Family Maintenance Act.*
Incidence of provision at court's discretion 13(2) The court may order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in the proportion and in the manner that the court considers proper.	No change in policy from the present *Testators Family Maintenance Act.*
Conflict of laws 14(1) In this section,	New. Provides for a scheme to govern in situations when a deceased dies in one jurisdiction, with property located in another.
"interest in land" includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real or personal property;	New. Defines interest in land.
"interest in movables" means an interest in tangible or intangible things other than land and includes personal property other than an estate or interest in land.	New. Defines interest in movables.

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
Property subject to an order 14(2) The court may grant an order making provision for a dependant in respect of (a) an interest in land situated in Manitoba; and (b) an interest in movables, no matter where situated, if the deceased died domiciled in Manitoba.	New. Sets out the jurisdiction of the court to make an order with respect to an interest in land situated in Manitoba and an interest in movables, wherever situated.
Domicile outside Manitoba 14(3) The court may make an order of provision in respect of an interest in movables situated in Manitoba at the time of the deceased's death if the deceased died domiciled outside Manitoba and (a) the law of the deceased's domicile does not provide for an application for maintenance and support under dependants' relief legislation; and (b) the dependant in whose favour the order is sought was habitually resident in Manitoba at the time of the deceased's death.	New. Sets out when the court has jurisdiction to make an order in respect of movables situated in Manitoba if the deceased died domiciled outside Manitoba.
Domicile outside Manitoba 14(4) When an application is made under this Act in respect of a deceased who died domiciled outside Manitoba leaving an interest in land situated in Manitoba, the court may stay the application pending the conclusion of a dependants' relief proceeding in the jurisdiction in which the deceased died domiciled.	New. Gives the court the power to suspend or stay the application in respect of land situated in Manitoba and owned by a deceased domiciled outside Manitoba until the application in the jurisdiction where the deceased died domiciled is concluded.
Application to discharge, suspend or reduce order 15(1) At any time subsequent to the making of an order of provision for maintenance and support, an application to have the order discharged, suspended or reduced may be made to the court by or on behalf of any of the following persons: (a) the deceased's personal representative; (b) a person entitled under the deceased's will or under The Intestate Succession Act; (c) a dependant.	Allows for an application to discharge, suspend or reduce an existing order. Sets out who may make such an application.
Power of court to discharge, suspend or reduce 15(2) In an application under subsection (1), the court shall consider	New. Sets out what the court should consider in an application to discharge, suspend or reduce.

(a) whether the dependant who benefitted by the order has become entitled to any other provision for his or her maintenance and support; and

(b) the reasonableness of the maintenance and support ordered;

and may discharge, suspend or reduce the provision made under the order.

Exception

15(3) Specified property that was ordered transferred absolutely to a dependant or a lump sum ordered to be paid directly to a dependant is not subject to an order under subsection (2).

Order for increased provision

16(1) Subject to subsections (2) and (3), at any time subsequent to the making of an order of provision for maintenance and support, a dependant in respect of whom the order was made may apply to the court for an order increasing the amount of provision.

When increased provision may be made

16(2) The court may make an order increasing the amount of provision if it is satisfied that

(a) since the date of the order circumstances have so changed that undue hardship will be caused to the applicant if the increase is not ordered; and

(b) it would not be inequitable to order increased provision having regard to the implications in respect of other persons interested in the estate.

Exception

16(3) An order may be made under this section only as to that portion of the estate remaining undistributed at the date notice of the application for increased provision is served on the personal representative.

Distribution stayed

16(4) The provisions of section 8 respecting the distribution of the estate by the personal representative with such modifications as the circumstances require, apply to an application under this section.

New. Provides which property would not be subject to an order to discharge, suspend or reduce.

New. Provides for an application for an order increasing an existing order under the Act.

New. Sets out the criteria the court should consider in an application to increase an existing order.

New. Provides that an order for increase may be made only with respect to the portion of the undistributed estate.

New. Provides that a personal representative may not proceed with the distribution of the undistributed portion of the estate when an application for increase is made and notice is served on the personal representative.

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
Enforcement 17(1) An order or direction made under this Act may be enforced against the estate of the deceased in the same way and by the same means as any other judgment or order of the court against the estate may be enforced.	No change in policy from the present *Testators Family Maintenance Act*.
Realization of security 17(2) When a court orders security for payment under an order made under this Act or charges a property therewith, the court may, upon application and notice to all persons having an interest in the property, direct its sale for the purpose of realizing the security or charge.	New. Gives the court the power to direct the sale of property that is subject to an order of security for payment.
Validity of mortgage, etc. 18 When provision for the maintenance and support of a dependant is ordered under this Act, a mortgage, charge or assignment of or with respect to such provision, made before the order of the court making such provision is entered, is invalid.	No change in policy from the present *Testators Family Maintenance Act*.
This Act subject to The Dower Act 19(1) The rights of a dependant under this Act are subject to the rights of a surviving spouse under The Dower Act.	New. Provides that rights under the proposed *Dependants Relief Act* supplement the rights under *The Dower Act*. At present benefits under *The Testators Family Maintenance Act* are in lieu of rights under *The Dower Act*.
Dower Act election does not preclude application 19(2) A surviving spouse who makes an election under The Dower Act may also apply for an order of provision under this Act.	
Crown bound 20 This Acts binds the Crown.	New. Binds the Crown.
Application 21 This Act applies where the deceased dies on or after the date on which this Act comes into force.	New. Provides that the new Act applies where a person died on or after the date in which the Act comes force.
Repeal 22(1) Subject to subsection (2), The Testators Family Maintenance Act, R.S.M. 1988, c. T50, is repealed.	Transitional provisions.

PROPOSED DEPENDANTS RELIEF ACT	COMMENTS
Exception 22(2) The Testators Family Maintenance Act, R.S.M. 1988, c. T50, continues in force as if unrepealed where the deceased dies before the date on which this Act comes into force.	
C.C.S.M. reference 23 This Act may be referred to as chapter D37 of the Continuing Consolidation of the Statutes of Manitoba.	Self-explanatory.
Coming into force 24 This Act comes into force on a day fixed by proclamation.	Self-explanatory.

EXPLANATION PAPER:

THE INTESTATE SUCCESSION AND CONSEQUENTIAL AMENDMENTS ACT

The bill repeals and replaces The Devolution of Estates Act. The proposed Intestate Succession Act sets out rules for the division of an estate if a person dies without a will. Any person wanting his or her estate divided in a different fashion must make a will. The following sets out the major changes encompassed in The Intestate Succession Act.

1. "All to Spouse Rule" — At present, when a person dies without a will (intestate), The Devolution of Estates Act provides for the surviving spouse to receive the whole estate if the deceased has no "issue" (children, grandchildren or other lineal descendants). If there are descendants, the surviving spouse receives the first $50,000 from the estate (preferential share) and one-half of the remainder, with the rest of the estate, if any, shared equally between the deceased's issue.

This bill provides that where a deceased is survived by a spouse and no issue, or all issue are those of the surviving spouse, the surviving spouse receives the entire estate. Where a deceased is survived by a spouse and issue who are *not* issue of the surviving spouse; the spouse receives

(a) a preferential share of the estate of $50,000 or 50% of the estate, whichever is greater; and

(b) one-half of the remainder of the estate.

The balance of the residue will be distributed equally between all issue of the deceased.

The effect of these changes is that in most situations, the surviving spouse will receive the entire estate, even where there are children from another union. In most situations, the average estate, which excludes jointly held property is likely to be $50,000.00 or less. The proposal makes provision for where there are children of the deceased from a previous union and the estate is large.

2. Rights of a Separated Spouse — Presently, The Devolution of Estates Act provides that a spouse can apply for relief, even if the spouses were living separate at the time of the death of the intestate. The new bill would exclude a spouse where the spouses were living separate and apart at the time of the intestate's death and one of the following conditions is satisfied:

i) the parties had been separated for at least 1 year prior to the death, or

ii) one or both of the spouses applied for a divorce or an accounting or equalization under The Marital Property Act, or

iii) there was a course of conduct through legal counsel showing an attempt by either of the spouses to finalize their affairs, in recognition of their marriage breakdown, or

iv) before the death, the spouses divided their property in a manner that was intended by them to separate and finalize their affairs.

This change is based on the belief that spouses who are separated would not wish the survivor to receive all, or substantially all, of the deceased's estate, but that the survivor's rights be limited to property rights pursuant to The Marital Property Act and support pursuant to the Dependants Relief Act.

3. Changes to method of determining next-of-kin — The proposed method for determining next-of-kin is simpler and more straightforward than the current archaic system of counting of degrees of consanguinity. The proposed system of determining next-of-kin through stated ancestors will produce the same result as the present law in most situations – substantive change would occur only with respect to the share of a more distant relative.

4. Inheritance by Representation — At present, The Devolution of Estates Act provides that, in certain instances, the children, or descendants of a deceased relative, receives what that relative would have been entitled to had he or she survived.

For example: A dies without a will leaving no surviving spouse. A had two children, B and C, both of whom die before A. B left two surviving children, B1 and B2, while C left one surviving child, C1. The surviving children of B and C (grandchildren of the deceased person, A) would, by representation, inherit their deceased parents' shares as follows: B1 and B2 split B's one-half share, thus each receives one-quarter share of A's estate. C1 receives all of C's share, which is one-half of the estate.

This Bill provides that members of the same generation be treated equally and that members of a more remote generation should not receive a larger share of an intestate's estate than a member of a closer generation.

In the above example, the grandchildren would not divide the shares that would have gone to their deceased parents. Instead, each would receive an equal share, i.e. B1, B2 and C1 would each get one-third of the estate.

5. Survival for 15 days — The bill requires that an heir must survive the intestate by 15 days in order to be entitled to a benefit under the Act. Most wills contain a provision requiring that an heir survive the testator for a certain period of time.

6. The provisions dealing with real property are not limited to intestacy situations and therefore have been moved to the Law of Property Act. This provisions are basically unchanged except for the deletion of the authority of the Registrar General to make an order approving a sale or conveyance of land as the Land Titles Office no longer scrutinizes the actions of personal representatives under the proposed scheme; only a Queen's Bench judge can approve such a conveyance or sale.

PROPOSED BILL	COMMENTS
Interpretation 1(1) In this Act, "estate" includes both real and personal property; "issue" means all lineal descendants of a person through all generations; "successors" means the persons who are entitled to the estate of an intestate through succession under this Act.	1(1) No change in policy.
Status of adopted child 1(2) For greater certainty, if the relationship of parent and child must be established at any generation in order to determine succession under this Act, the relationship shall be determined in accordance with the provisions of the Child and Family Services Act respecting the effect of adoption.	1(2) New. Clarifies that the provision in The Child and Family Services Act which gives adopted children the same status as biological children applies.
Kindred born after death of intestate 1(3) Kindred of the intestate conceived before and born alive after the death of the intestate inherit as if they had been born in the lifetime of the intestate.	1(3) No change in policy.
Kindred of the half blood 1(4) Under this Act, kindred of the half blood inherit equally with kindred of the whole blood of the same degree of kinship to the intestate.	1(4) No change in policy.
Share of spouse if no issue 2(1) If an intestate dies leaving a surviving spouse and no issue, the entire intestate estate goes to the surviving spouse.	2(1) Where the intestate dies with a surviving spouse and no issue, the entire estate would go to the surviving spouse. No change in policy.
Share of spouse if all issue of both intestate and surviving spouse 2(2) If an intestate dies leaving a surviving spouse and issue, and all of the issue are also issue of the surviving spouse, the entire intestate estate goes to the surviving spouse.	2(2) Where the intestate is survived by a spouse and issue, all of whom are issue of the deceased and the surviving spouse, the surviving spouse gets the entire estate.

PROPOSED BILL

Share of spouse if issue of intestate but not surviving spouse

2(3) If an intestate dies leaving a surviving spouse and issue, and one or more of the issue are not also issue of the surviving spouse, the share of the surviving spouse is

(a) $50,000., or one-half of the intestate estate, whichever is greater; and

(b) one half of any remainder of the intestate estate after allocation of the share provided by clause (a).

Reduction of preferential share in cases of partial intestacy

2(4) The maximum entitlement set out in clause (3)(a) shall be reduced by an amount equal to the value of any benefits received by the surviving spouse under a will of the deceased.

Rights of separated spouse

3 If, at the time of the intestate's death, the intestate and his or her spouse were living separate and apart from one another, and one or more of the following conditions is satisfied:

(a) the separation had subsisted for at least one year prior to the intestate's death;

(b) during the period of separation, one or both of the spouses applied for a divorce or for an accounting or equalization of assets under The Marital Property Act;

(c) during the period of separation, there was a course of conduct through the spouses' legal counsel evidencing an attempt by the intestate and his or her spouse to separate and finalize their affairs in recognition of their marriage breakdown; or

(d) before the intestate's death, the intestate and his or her spouse divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of their marriage breakdown;

the surviving spouse shall be treated as if he or she had predeceased the intestate.

COMMENTS

2(3), 4(1), 4(2) Where the intestate is survived by a spouse and children who are not children of the surviving spouse:

(a) a preferential share of the estate would go to the surviving spouse of $50,000 or 50% of the estate, whichever is greater; and

(b) 50% of the residue of the estate would go to the surviving spouse and the balance equally between *all* surviving children.

2(4) Provides that the surviving spouse's preferential share is reduced by any benefit received under the will.

3 New. Presently, a spouse can apply under The Devolution of Estates Act even if separated at the time of the death of the intestate. This would exclude spouses from applying for relief where the spouses were living separate and apart at the time of the intestate's death and one of the listed criteria is met. This change is based on the belief that spouses who are separated would not wish the survivor to receive all, or substantially all, of the deceased's estate, but that the survivor's rights be limited to property rights pursuant to the The Marital Property Act, and support pursuant to The Dependants Relief Act.

PROPOSED BILL

Share of kindred

4(1) The part of the intestate estate not included in the share of the surviving spouse, or the entire estate if there is no surviving spouse, shall be distributed in accordance with this section.

Shares of issue

4(2) If there is surviving issue, the estate goes to the issue of the intestate to be distributed per capita at each generation as provided in section 5.

Neither spouse nor issue

4(3) If there is no surviving issue, the estate goes to the parents of the intestate in equal shares or to the survivor of them.

No spouse, issue or parents

4(4) If there is no surviving issue or parent, the estate goes to the issue of the parents of the intestate or either of them to be distributed per capita at each generation as provided in section 5.

No issue, parent, or issue of parent

4(5) If there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,

(a) one half of the estate goes to the paternal grandparents in equal shares or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either or them to be distributed per capita at each generation as provided in section 5; and

(b) one half of the estate goes to the maternal grandparents or their issue in the same manner as provided in clause (a);

but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in clause (a).

No issue, parent or issue of parent, grandparent or issue of grandparent

4(6) If there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent but the

COMMENTS

4(1) New. Sets out how the part of the estate that is not included in the share of the surviving spouse, or the estate if there is no surviving spouse, is to be distributed.

See also 2(3).

4(2) Provides for distribution to surviving issue.

4(3) No change in policy.

4(4) Does not change who will inherit, but does change the manner of distribution.

4(5), 4(6) New. Changes lines of consanguinity as recommended by the Uniform Law Conference of Canada and the Law Reform Commission of Manitoba. This proposal is adopted from the American Uniform Probate Code and is explained by the Manitoba Law Reform Commission in its Report entitled "'Intestate Succession" at pages 29-31: "The method for determining next-of-kin by counting degrees of consanguinity is to be replaced by a system based on representation through stated ancestors. Under this system the part of the intestate estate that does not pass to a surviving spouse passes first to the issue of the intestate, second to parents of the intestate and their issue, and then to grandparents and their issue. The system will produce the same result as existing law in most intestacy situations; substantive change only occurs with respect to the shares of a more distant relative."

"... First priority for receiving the intestate estate is given to the deceased's issue, which means the deceased's children, grandchildren, great-grandchildren, etc. Where no issue survive, the deceased's par-

PROPOSED BILL

intestate is survived by one or more great-grandparents or issue of great-grandparents,

(a) one half of the estate goes to the paternal great-grandparents or their issue in two equal shares, as follows:

(i) one share to the parents of the paternal grandfather in equal share or to the survivor of them, but if there is no surviving parent of the paternal grandfather, to the issue of the parents of the paternal grandfather or either or them to be distributed per capita at each generation as provided in section 5; and

(ii) one share to the parents of the paternal grandmother or their issue in the same manner as provided in subclause (1),

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal grandfather's or paternal grandmother's side, one half of the estate goes to the kindred on that side in the same manner as provided in subclause (i); and

(b) one half of the estate to the maternal great-grandparents or issue in the same manner as provided in clause (a);

but if there is only a surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire estate goes to kindred on that side in the same manner as provided in clause (a).

Distribution to issue

5(1) When a distribution is to made to the issue of a person, the estate or the part of the estate which is to be so distributed shall be divided into as many shares as there are

(a) surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors; and

(b) deceased persons in the same degree who left issue surviving the intestate.

COMMENTS

ents, or survivors of them, take the estate; if neither is living, the issue of the parents is entitled. Issue of the parents would include the deceased's brothers and sisters, nephews and nieces, grandnephews and grandnieces, etc. If there is no surviving issue, parent or issue of a parent, but the grandparents or their issue survive, one-half of the estate passes to the paternal grandparents or the survivor of them, or their issue where both are deceased; the other one-half passes to the maternal grandparents or their issue in the same manner. Issue of grandparents would include the deceased's uncles and aunts, first cousins, first cousins once removed, etc."

The (proposed) method for determining next-of-kin is simpler and more straightforward than the current provisions. "...the personal representative is able to determine those persons entitled to take the estate without the use of the more difficult and archaic counting of degrees of consanguinity."

5 New. Provides for Inheritance by Representation ("per capita at each generation"). At present, The Devolution of Estates Act provides that, in certain instances, the children, or descendants of a deceased relative, receive what the relative would have been entitled to had he or she survived. For example: A dies without a will leaving no surviving spouse. A had children, B and C, both of whom died earlier. B left two surviving children, B1 and B2, while C left one surviving child, C1. The surviving children of B and C (grandchildren of the deceased person, A) would, by representation,

PROPOSED BILL

Distribution to issue

5(2) Each surviving successor in the nearest degree which contains any surviving successor shall receive one share, and the remainder of the intestate estate, if any, is divided in the same manner as if the successors already allocated a share and their issue had predeceased the intestate.

Survival for 15 days

6(1) A person who fails to survive the intestate for 15 days, excluding the day of death of the intestate and of the person, shall be treated as if he or she had predeceased the intestate for purposes of succession under this Part.

Survival for 15 days

6(2) If the death of a person who would otherwise be a successor has been established, but it cannot be established that that person survived the intestate for the period required by subsection (1), that person shall be treated as if he or she had failed to survive the intestate for the required period.

Application

6(3) This section does not apply where its application would result in a distribution of the intestate estate to the Crown under section 7.

No successors

7 If there is no successor under this Part, the intestate estate shall go to the Crown.

COMMENTS

inherit their deceased parents' shares as follows: **B1** and **B2** split **B's** one-half share, thus each receives one-quarter share of the estate. **C1** receives all of **C's** share, i.e. one-half of the estate. The proposal changes the distribution, by providing that members of the same generation will be treated equally. Members of a more remote generation should not receive a larger share of an intestate's estate then a member of a closer generation.

In the above example, the grandchildren would not inherit the shares that would have gone to their deceased parents. Instead, each would receive an equal share within their generation., i.e., **B1, B2** and **C1** each get one-third of the estate.

6 New. Requires that an heir survive the intestate by 15 days in order to inherit the deceased's intestate property. The purpose is to avoid multiple estate administration when both the intestate and the "survivor" die within a short time of each other, and to prevent property from passing to persons not desired by the intestate. Most wills contain such provisions.

7 If there are no issue of great-grandparents, the estate goes to the Crown. In practical terms, no change from existing law.

PROPOSED BILL

Advancements

8(1) If a person dies intestate as to all of his or her estate, property which the intestate gave to a prospective successor during the lifetime of the intestate shall be treated as an advancement against that successor's share of the estate if the property was either

(a) declared by the intestate orally or in writing at the time the gift was made; or

(b) acknowledged orally or in writing by the recipient;

to be an advancement.

Value of advancement

8(2) Property advanced shall be valued as declared by the intestate, or acknowledged by the recipient, in writing, otherwise it shall be valued as of the time of the advancement.

Effect of advancement on recipient's issue

8(3) If the recipient of the property advanced fails to survive the intestate, the property advanced shall not be treated as an advancement against the share of the estate of the recipient's issue unless the declaration or acknowledgement of the advancement so provides.

Determination of share of successor

8(4) Under this section, the shares of the successors shall be determined as if the property advanced were part of the estate available for distribution, and if the value of the property equals or exceeds the share of the estate of the successor who received the advancement, that successor shall be excluded from any share of the estate, but if the value of the property advanced is less than the share of the estate of the successor who received the advancement, that successor shall receive as much of the estate as is required, when added to the value of the property advanced, to give the successor his or her share of the estate.

COMMENTS

8(1) Proposal expands advancement provisions to be applicable to any prospective successor, while previously these provisions applied only to a child of an intestate.

Proposal provides that property which an intestate gave in his/her lifetime to a successor shall be treated as an advancement if it is shown that either

(a) the intestate has expressed an intention orally or in writing; or

(b) the recipient had acknowledged, orally or in writing, that the property was to be an advancement.

8(2) No change in valuation of property.

8(3) Change in policy. Recipient's issue does not have to account for advancement unless there was a declaration or acknowledgment providing for it.

8(4) Sets out how the shares of the successors shall be determined.

PROPOSED BILL	COMMENTS
Onus of proof 8(5) Unless the advancement has been declared by the intestate, or acknowledged by the recipient, in writing, the onus of proving that an advancement was made is on the person so asserting.	8(5) No change in policy.
Estate not disposed of by will 9 That part of an estate not disposed of by will shall be distributed in accordance with this Act.	9 No change in policy.
Application of Dower Act 10 The rights of a surviving spouse under this Act are in addition to the spouse's entitlement to a life estate in the homestead under The Dower Act.	10 Clarifies that the rights of a surviving spouse supplement rights under The Dower Act.
Application of this Act 11 This Act applies in cases of death occurring on or after the day this Act comes into force.	11 Amendments apply to estates of persons who die or on after the date the amendments come into force.
Repeal 12(1) Subject to subsection (2), The Devolution of Estates Act, R.S.M. 1987, c. D70, is repealed.	
Deaths before this Act comes into force 12(2) The Devolution of Estates Act, R.S.M. 1987, C.D70, continues in force as if unrepealed in cases of death occurring before this Act comes into force.	12(2) Transitional provision.
Reference in C.C.S.M. 13 This Part may be cited as the Intestate Succession Act and may be published in the Continuing Consolidation of the Statues of Manitoba under that title and may be referred to as Chapter 185 of those Statutes.	
PART 2 **CONSEQUENTIAL AMENDMENTS TO OTHER ACTS**	
C.C.S.M. c.L90 amended 14 The Law of Property Act is amended by adding the following after section 17:	14 These provisions are not limited to intestacy situations and therefore have been moved to the Law of Property Act.
Liabilities of estate of an intestate 17.1 When a person dies intestate, either the real or the personal estate of the deceased, or both, except in so far as either or both may be excepted by any law or	17.1 No change in policy.

PROPOSED BILL	COMMENTS
enactment, are chargeable with all legal debts, liabilities and funeral expenses.	
Definition of "land" 17.2 In section 17.3 to 17.9, "land" includes lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein may be, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges, easements, mines, minerals and quarries appertaining thereto, and all trees and timber, thereon and thereunder lying or being, unless any of them are specially excepted.	17.2 No change in policy.
Descent of land after July 1, 1885 17.3(1) From and after July 1, 1885, land in the province vested in a person without a right in any other person to take by survivorship, went and hereafter goes, notwithstanding any testamentary disposition, to the personal representative of deceased owners in the same manner as personal estate goes.	17.3(1) No change in policy.
Application of section 17.3(2) This section applies to any land over which a person executes, by will, a general power of appointment as if it were land vested in the person.	17.3(2) No change in policy.
Personal representative to hold land as trustee 17.3(3) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representative of a deceased person shall hold the land as trustee for the persons by law beneficially entitled to the land, and those persons have the same powers of requiring a transfer of land as persons beneficially entitled to personal estate have of requiring a transfer of the personal estate.	17.3(3) No change in policy.
Land to be dealt with in the same way as chattels real 17.3(4) All enactments and rules of law relating to the effect of probate or letters of administration respecting chattels real, respecting the dealing with chattels real before probate of administration, and respecting the payment of costs of administration and other matters in relation to the administration of personal estate, and the	17.3(4) Removes the ability of the Registrar General to approve sales or transfers of land. Places authority solely with a judge of the Court of Queens Bench.

PROPOSED BILL	EXISTING DEVOLUTION OF ESTATES ACT	COMMENTS
powers, rights, duties, and liabilities of the personal representative in respect of personal estate, apply to land, so far as they are applicable, as if the land were a chattel real vesting in the personal representative.		
Land to be administered in the same way as personal estate 17.3(5) In the administration of the assets of a deceased person, the person's land shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate, but nothing in this subsection alters or affects the order in which real and personal assets, respectively, are now applicable in or towards the payment of funeral of testamentary expenses, debts, or legacies, or the liability of land to be charged with the payment of legacies.		17.3(5) No change in policy.
Direction to personal representatives to convey, or sell 17.3(6) At any time after the expiration of one year from the date of letters probate or administration, if their personal representative has failed, on the request of the person entitled to a conveyance of land under the terms of the will of the testator, to convey the land to the person or persons so entitled, or where the lands are not specifically devised or in the case of administration, the personal representative has not within the same time sold the lands, then on the request of their person or persons so entitled to a conveyance or of the majority of their persons of adult age beneficially interested in the proceeds of the sale of the land, the judge of the court from which the letters probate or of administration issued,		17.3(6) No change in policy.
(a) may, after 14 days written notice, in such form as the judge may direct, to the personal representative and to all persons beneficially interested, order that a conveyance of the land specifically devised be made by the personal representative to the person or persons entitled thereto, within a time stated in the order; and		

(b) in the case of land not specifically devised and of land vested in an administrator, may order that the land be sold on such terms, and within such time, as is stated in the order.

Service of notice on minors

17.3(7) In the case of minors, a notice issued under subsection (6) shall be served on the Public Trustee in the Public Trustee's capacity as official guardian.

17.3(7) No change in policy.

Issue of vesting order

17.3(8) In default of compliance by a personal representative with an order made under clause (6)(a), the judge may issue a vesting order vesting the title to the land in the person or persons entitled as fully and completely as might have been done by a conveyance from the personal representative.

17.3(8) No change in policy.

Direction for sale by master of the court

17.3(9) In the event of the personal representative failing to carry out and execute an order under clause (6)(b) within such time as the judge considers reasonable, an order may be obtained by any person beneficially interested in the land referring the matter to the master and directing a sale of the land, and the sale so far as practicable shall be conducted, and the proceeds dealt with, according to the provisions of this Act respecting partition, and the rules of the Court of Queen's Bench, and on such terms of cash or credit or part cash and part credit as the judge may order.

17.3(9) No change in policy.

Meaning of "heirs and assigns"

17.4 In the case of a person dying on or after July 1, 1885, in the interpretation of any Act of the Legislature, or in the construction of any instrument to which the deceased was a party or was interested, the expression "heirs" or "heirs and assigns" or "heirs, executors, administrators or assigns", or any expression of similar import, shall be construed to mean the person's personal representative, unless a contrary intention clearly appears.

17.4 No change in policy.

Transaction of heirs protected in certain cases

17.5 Notwithstanding anything in this Act, all conveyances and leases made by the heir of heirs of a

17.5 No change in policy.

PROPOSED BILL	COMMENTS
deceased owner of land, or of an estate or interest in land, and all proceedings taken by way of foreclosure or sale or notice of sale under mortgage, or by way of administration or partition in equity, by or against heirs of any such deceased owner, before September 4, 1885, shall be deemed to have been good and valid, and to have been as effectual to pass the title to the land as if the conveyances and releases had been executed or the proceedings taken by or against the personal representative of the deceased owner.	
Service of notice where mortgagor dead 17.6 Where by or under a mortgage, whether under the new or old system as defined in The Real Property Act, and whenever made, a notice is stipulated to be given to the mortgagor or the mortgagor's heirs or assigns, the notice may be given, in cases where the mortgagor or the mortgagor's assign is dead, to the executor or administrator of the deceased person, and the notice is as effectual as if given in conformity with the stipulation.	17.6 No change in policy.
Powers of personal representative to sell land 17.7(1) Subject to subsection (2), a personal representative in whom land is vested under this Act may sell and convey the land.	17.7(1) No change in policy.
Limitation on power of personal representative 17.7(2) Where (a) minors or mentally disordered persons are beneficially interested in land as heirs or devisees; (b) there are contingent interests or interests not yet vested under a will; (c) the heirs or persons beneficially interested are not yet determined; or (d) adult heirs or adult devisees do not concur in the sale; and there are no debts, no sale made under subsection (1) is valid unless the sale is made with the approval of a judge of the Court of Queen's Bench, upon such terms as the judge may prescribe.	17.7(2) Removes the ability of the Registar General to approve sales of land. Places authority solely with a judge of the Court of Queens Bench.

PROPOSED BILL

COMMENTS

Order to personal representative
17.7(3) At any time after the expiration of one year from the date of letters probate or administration, if the personal representative has failed to sell and dispose of land vested in the personal representative under this Act, an heir or person beneficially interested in the land may apply to a judge of the Court of Queen's Bench for an order compelling the personal representative to offer the land or any portion of it for sale on such terms and conditions as the judge may prescribe.

17.7(3) No change in policy.

Notice of application to be served
17.7(4) No order shall be made under subjection (3) unless notice of the application has first been served on the personal representative.

17.7(4) No change in policy.

Opposing granting of order
17.7(5) An heir of person beneficially interested in land mentioned in this section may attend on any application made under this section and oppose the granting of an order.

17.7(5) No change in policy.

Power of personal representative to lease minerals
17.8(1) Subject to subsection (2), a personal representative in whom the mines and minerals in, on or under land are vested under this Act may grant or join in or consent to grants of, rights and licences to search for, mine for, drill for, take, win or gain and remove, the minerals or any specified mineral by an instrument commonly called a "lease", or otherwise.

17.8(1) No change in policy.

Limitation on powers of personal representative
17.8(2) Where

(a) minors or mentally disordered persons are beneficially interested in the mines and minerals as heirs or devisees;

(b) there are contingent interests not yet vested under a will;

(c) the heirs or persons beneficially interested are not yet determined; or

(d) adult heirs or adult devisees do not concur in the grant, consent or instrument;

17.8(2) No change in policy.

PROPOSED BILL	COMMENTS
no such grant or consent is valid unless it is made with the approval of a judge of the Court of Queen's Bench in which the land lies, upon such terms as the judge may prescribe.	
Opposition to order 17.8(3) An heir or person beneficially interested in the mines and minerals mentioned in this section may attend on an application made under this section and oppose the granting of an order.	17.8(3) No change in policy.
No restriction on trustee 17.8(4) Nothing in this section requires the consent of any person or the approval of a judge to a grant of a mining lease by a personal representative which the personal representative is empowered, under The Trustee Act, to grant without such consent or approval.	17.8(4) No change in policy.
Confirmation of past sales 17.9 In the case of a sale of land by an executor or administrator without having had the sale approved by the proper person appointed for that purpose by an Act of the Legislature, where that approval is necessary, a judge of the Court of Queen's Bench may, if the judge thinks it proper to do so, confirm the sale upon such terms as the judge may order, and the sale, when confirmed, shall be as fully valid as if it had been approved by the proper person at the time the sale was made.	17.9 No change in policy.
Effect of secs. 17.3 and 17.7 17.10 The provisions of sections 17.3 and 17.7 which are not merely declaratory of what the law was prior to March 16, 1906 are not retroactive so as to affect any rights conferred before that date.	17.10 No change in policy.
C.C.S.M. c.P275 amended 15 Subsection 4(5) of The Public Trustee Act iis amended by striking out "The Devolution of Estates Act" and substituting "The Intestate Succession Act".	15 Housekeeping amendments.
C.C.S.M. c.R30 amended 16 Subsection 168(1) of The Real Property Act is amended by striking out "The Devolution of Estates Act" and substituting "The Intestate Succession Act".	16 Housekeeping amendments.

PROPOSED BILL

C.C.S.M. c.T160 amended

17 Subsection 48 of The Trustee Acted is amended by striking out "The Devolution of Estates Act" where it occurs in subsections (1) and (2) and substituting "The Intestate Succession Act".

Coming into force

18 This Act comes into force on a day fixed by proclamation.

COMMENTS

16 Housekeeping amendments.

EXPLANATION PAPER:
THE WILLS AMENDMENT ACT

The major amendment provided for by this Act implements a recommendation of the Law Reform Commission of Manitoba. This proposal would provide that where a person (testator) dies with a will, which leaves a gift to his or her child, who had died without a will before the death of the testator, the gift would go to the children of the deceased child.

The present Act provides that in such a situation the gift to the child by the will does not lapse, but is distributed as if the child had died intestate. Therefore, under the present law the child's spouse is entitled to at least one-half of the gift. Without this amendment, under the proposed replacement of The Devolution of Estates Act, the child's spouse would inherit the entire gift in most situations.

The effect of the amendment is that the children of the deceased child (grandchildren of the testator), rather than the spouse of the deceased child (daughter-in-law or son-in-law of the testator) would inherit the gift from the testator. This brings Manitoba in line with other Canadian jurisdictions.

The other amendments are technical in nature.

PROPOSED AMENDMENTS	EXISTING WILLS ACT	COMMENTS
C.C.S.M. c. W150 amended 1 The Wills Act is amended by this Act.		
Section 25 amended 2 Section 25 is amended by adding "Subject to sections 25.1 and 25.2 and" before "Except when a contrary intention".	**Lapsed and void devises.** 25 Except when a contrary intention appears by the will, real or personal property or an interest therein that is comprised, or intended to be comprised, in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained, in the will.	2 Technical change as recommended by the Law Reform Commission of Manitoba. The purpose of the change is to clarify the relationship among the three provisions in the Act that deal with lapse of gifts made by will.
Section 33 amended 3 Section 33 is amended by renumbering it as subsection 25.1.	**Devise of estate tail** 33 Except when a contrary intention appears by the will, where a person to whom real property is devised for what would have been, under the law of England, an estate tail or in quasi entail (a) dies (i) in the lifetime of the testator, or (ii) at the same time as the testator, or (iii) in circumstances rendering it uncertain whether that person or the testator survived the other; and (b) leaves issue who would inherit under the entail if that estate existed; If any such issue are living at the time of the death of the testator the devise does not lapse but creates an estate in fee simple in possession.	3 Puts all of the lapse provisions together. Recommended by the Law Reform Commission of Manitoba.
Section 34 amended 4 Section 34 is amended (a) by renumbering it as section 25.2; and (b) by adding "without leaving a spouse" after "if that person had died intestate" in that part of the section that follows clause (b).	**When issue predecease testator** 34 Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person (a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before the death of the child or	4 New. Recommended by the Law Reform Commission. The major amendment provided for by this Act implements a recommendation of the Law Reform Commission of Manitoba. This proposal would provide that where a person (testator) dies with a will, which leaves a gift to his or her child, who had died without a will before the death of the testator, the gift would go to the children of the deceased child. The present Act provides

PROPOSED AMENDMENTS	EXISTING WILLS ACT	COMMENTS
	other issue or the brother or sister, as the case may be; and (b) leaves issue any of whom is living at the time of the death of the testator; the devise or bequest does not lapse, but takes effect as if it had been made directly to other persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate and without debts immediately after the death of the testator.	that in such a situation the gift to the child by the will does not lapse, but is distributed as if the child had died intestate. Therefore, under the present law, the child's spouse is entitled to at least one-half of the gift. Without this amendment, under the proposed replacement of The Devolution of Estates Act, the child's spouse would inherit the entire gift in most situations. The effect of the amendment is that the children of the deceased child (grandchildren of the testator) rather than the spouse of the deceased child (daughter-in-law or son-in-law of the testator) would inherit the gift from the testator. This brings Manitoba in line with other Canadian jurisdictions.
Section 25.4 added 5 The following is added as section 25.3: **Definition of issue** 25.4 For the purpose of sections 25.1 and 25.2, issue conceived before the testator's death and born living thereafter shall be considered to be alive at the testator's death.		5 New. Protects children who were conceived before the testator's death and born after the testator's death.
Subsection 38(1) amended 6 Subsection 38(1) is amended by striking out "subsections (2) and (3)" and substituting "subsections (2), (3) and (4)".		6 Housekeeping.
Subsection 38(2) repealed and replaced 7 Subsection 38(2) is repealed and the following is substituted: **Application of anti-lapse provisions** 38(2) Where a person dies on or after April 16, 1964 but before the coming into force of this subsection, section 34 of The Wills Act, R.S.M. 1988, c. W150, notwithstanding its repeal, applies to the will of the person whether it was made before or after April 16, 1964.	**Application of sec. 34.** 38(2) Where a person dies on or after April 16, 1964, section 34 applies to the will of the person whether it was made before or after that date.	7 Transitional provision. Provides that the changes in the law that are contained in this Bill will apply to testators who die after it comes into force.

PROPOSED AMENDMENTS	EXISTING WILLS ACT	COMMENTS
Subsection 38(4) added 8 The following is added after subsection 38(3): **Application of section 25.2** 38(4) Where a person dies on or after the day this section 25.2 comes into force, section 25.2 applies to the will of the person whether it was made before or after that date.		8 Transitional provision. Provides that the changes in the law that are contained in this Bill will apply to testators who die after it comes into force.
Section 60 amended 9 Section 60 is amended by striking out "subsections 38(2) and (3)" where it appears in subsections (1) and (2) and substituting "subsections 38(2), (3) and (4)".		9 Housekeeping.
Coming into force 10 This Act comes into force on a day fixed by proclamation.		10 Self-explanatory.

EXPLANATION PAPER:
THE DOWER AMENDMENT ACT

The Act to Amend The Dower Act contains two amendments to the existing Act:

1. An amendment which provides that rights under The Dower Act take priority over an order made against the estate under The Dependants Relief Act

2. An amendment that clarifies when a separated spouse loses rights under The Dower Act. The amendment, which is consistent with the proposed replacement of The Devolution of Estates Act, excludes a spouse who was living separate and apart from the deceased at the time of death from applying for relief under certain circumstances:

   i) the parties had been separated for at least 1 year prior to the death,

   iii) one or both of the spouses applied for a divorce or an accounting or equalization under The Marital Property Act,

   iii) there was a course of conduct through legal counsel which shows an attempt by the spouses to finalize their affairs, in recognition of their marriage breakdown, or

   iv) before the death, the spouses divided their property in a manner that was intended by them to separate and finalize their affairs.

The amendment has been approved by the Family Law Subsection of the Manitoba Bar. It was felt that most separated spouses would not wish the surviving spouse to take more than provided for in the deceased's will. If no bequest was left to such a spouse, he or she could apply for division of marital property under The Marital Property Act, and for support under The Dependants Relief Act.

DOWER AMENDMENT ACT	EXISTING DOWER ACT	COMMENTS
HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:		
C.C.S.M. c. D100 amended 1 The Dower Act is amended by this Act.		
Section 21 and 22 repealed and substituted 2 Sections 21 and 22 are repealed and the following substituted:		
Priority of wife's share 21(1) The wife's entitlement to a share of her husband's net real and personal property under section 15 has priority over (a) the gifts made by the husband's will; and (b) an order made against the husband's estate under The Dependants Relief Act.	**Priority of widow's share** 21 Where a widow becomes entitled to receive under section 15 from her husband's executor the share of his net real and personal property for which provision is made in that section, that share shall, in so far as the beneficiaries under the will are concerned, be considered and construed as if it were a debt of the testator at the time of his death, and is payable next after all the debts of the deceased, and has priority over all bequests, gifts, and devises contained in the will.	21(1) (a) Clarifies the existing section. 21(1) (b) New. Provides that The Dower Act takes priority over an order made under The Dependants Relief Act.
Application 21(2) Subsection (1) applies in respect of deaths occurring on or after the day this section come into force.		
Rights of separated spouse 22(1) If, at the time of the husband's death, the husband and wife were living separate and apart from one another, and one or more of the following conditions is satisfied: (a) the separation had subsisted for at least one year prior to the husband's death; (b) during the period of separation, one or both of the spouses applied for a divorce or an accounting of equalization of assets under The Marital Property Act;	**Rights if wife living apart** 22(1) Where a wife at the time of her husband's death had left her husband with the intention of living separate and apart from him, she has no right under this Act either to a life estate in the homestead or to any share in her husband's estate unless a judge of the court, on application made to him, otherwise directs by order.	22(1) This provision is consistent with the proposed replacement of The Devolution of Estates Act and excludes a spouse who was living separate at the time of the death from applying for relief under certain circumstances. The reason for this provision being inserted in The Dower Act is that most separated spouses would not wish the survivor to receive more than their entitlement under The Marital Property Act and The Dependants Relief Act.

DOWER AMENDMENT	EXISTING DOWER ACT	COMMENTS
(c) during the period of separation, there was a course of conduct through the spouses' legal counsel evidencing an attempt by the husband and wife to separate and finalize their affairs in recognition of their marriage breakdown; or (d) before the husband's death, the husband and wife divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of their marriage breakdown; the wife has no right under this Act either to a life estate in the homestead or to a share in the estate of her husband. **Application** 22(2) Subsection (1) applies in respect of deaths occurring on or after the day this section comes into force. **Coming into force** 3 This Act comes into force on a day fixed by proclamation and applies in respect of deaths occurring on or after that date.		3 The amendment applies to estates of persons who died on or after the date on which the amendment comes into force.

EXPLANATION PAPER:
THE FAMILY MAINTENANCE AMENDMENT ACT

1. The Bill clarifies the right of access of a non-custodial parent to school and medical records. The Manitoba Court of Appeal has interpreted the existing provisions of the Family Maintenance Act which gives a non-custodial parent the right to information pertaining to the child, as not being limited to a right to receive information. The Court of Appeal expanded the provision to give the non-custodial parent the right to be consulted. The original intention was that the provision be restricted to the right to receive information only. The amendment clarifies the intent of the legislation, which is to restrict the right to receive information only.

2. The Bill would enable a court to order that an obligation to pay child support be binding on the payor's estate. At present, The Family Maintenance Act contains such a provision with respect to order of spousal support, but no similar provision for child support.

3. The Bill would give the court discretion to order that imprisonment may be served intermittently for failure to comply with the terms of a support order. This provision will enable a period of imprisonment to be ordered without jeopardizing or reducing the period of the payor's employment.

4. The remaining of the amendments are of a housekeeping nature.

THE FAMILY MAINTENANCE AMENDMENT ACT	EXISTING FAMILY MAINTENANCE ACT	COMMENTS
C.C.S.M. c. F20 amended 1 The Family Maintenance Act is amended by this Act.		
Subsection 39(5) added 2 The following is added after subsection 39(4):		
Exception 39(5) The right of the non-custodial parent to receive the records described in subsection (4) is a right to be provided with information only and is not, unless a court orders otherwise, a right to be consulted about or to participate in the making of decisions by the parent granted custody.	**Access of parent to school and medical records.** 39(4) Unless a court otherwise orders, the non-custodial parent retains the same right as the parent granted custody to receive school, medical, psychological, dental and other reports affecting the child.	The Manitoba Court of Appeal has interpreted the existing section 39(4) as not being limited to a right to receive information, and has expanded the provision to a right to be consulted. The proposal clarifies the intent of the legislation, which is to restrict the right to receive information only.
Clause 40(e) added 3 Section 40 is amended by adding the following clause; (e) That the obligation and liability for support, maintenance and education continue after the death of the person charged with the obligation and be a debt of his or her estate for a period fixed in the order.		The Act now contains a provision which enables a court to order that an obligation to pay spousal support be binding on the payor's estate. The proposal would enable the court to make such an order with respect to child support.
Subsection 56(5) amended 4 Subsection 56(5) is amended by striking out "clause 1(e)" and substituting "clause 2(e)".	**Hearing** 56(5) Where the person entitled to payment objects in writing to the interim order made under clause (1)(e), the designated officer shall issue a summons under subsection 57(1).	Housekeeping
Subsection 57(1) amended 5 Subsection 57(1) is amended by striking out all that portion preceding clause (a) and substituting the following: Whether or not any other enforcement proceedings have been taken or could be taken, the designated officer may issue a summons requiring a person in default under an order to	**Enforcement proceedings before judge or master** 57(1) Whether or not any other enforcement proceedings have been taken or could be taken, the designated officer may proceed with the hearing in that person's absence or issue a summons requiring a person inn default under an order to (a) appear at a hearing before a judge or master at a time and place specified in the summons to show cause why the order should not be enforced under this section; and	Housekeeping

THE FAMILY MAINTENANCE AMENDMENT ACT	EXISTING FAMILY MAINTENANCE ACT	COMMENTS
	(b) file with the court, either before or at the time of the hearing, a financial statement in a form satisfactory to the judge or master.	
Subsection 57(3) amended 6 Subsection 57(3) is amended by striking out all that portion preceding clause (a) and substituting the following: At a hearing under this section, the judge or master shall inquire into the circumstances of the person in default and may make one or more of the following orders:	**Enforcement hearing.** 57(3) At a hearing under this section, the judge or master shall inquire into the circumstances of the person in default, and may make an order (a) imprisoning that person for a period not exceeding 30 days or fining that person an amount not exceeding $500. or both; (b) for payment of the arrears in full by a specified date; (c) for periodic payment on the arrears; (d) adjourning the hearing with or without conditions where the judge or master is satisfied that the person in default cannot at that time make any payments on the arrears; or (e) dismissing the proceedings.	Housekeeping
Subsection 57(3.1) amended 7 The following is added after subsection 57(3): **Imprisonment served intermittently** 57(3.1) Where a judge or master makes an order of imprisonment under clause (3)(a), the imprisonment may be ordered to be served intermittently at such times as are specified in the order.		This provision gives the court discretion to order that imprisonment may be served intermittently. This provision will enable a period of imprisonment to be ordered without jeopardizing or reducing the period of the payor's employment.
Subsection 57(4) amended 8 Subsection 57(4) is amended by striking out all that portion preceding clause (b) and substituting the following: Where a judge or master makes an order under clause 3(b) or (c), the judge or master may at that time make one or more of the following orders:	**Additional penalties** 57(4) Where a judge or master makes an order under clause (3)(b) or (c), the judge or master may, at that time, also order (a) that, upon failure to make any payment by a date specified in the order, the person in default be imprisoned for a period of not more than 30 days for each default or be fined in an amount not exceeding $500. for each default, or both;	The imprisonment aspect of subsection 57(4)(a) was held by the Court of Queen's Bench to be unconstitutional. Therefore, it is being struck from the Act.

THE FAMILY MAINTENANCE AMENDMENT ACT	EXISTING FAMILY MAINTENANCE ACT	COMMENTS
(a) that upon failure to make any payment by a date specified in the order, the person in default be fined in an amount not exceeding $500. for each default;	(b) that the person in default deposit a specified amount in court, or with such person as the judge or master deems fit, to be held as security and for use in the event of default or in the event of any subsequent order increasing the amount of any payment to be made under an order; (c) that the person in default enter into a bond in a specified amount, with or without sureties who shall severally justify and be approved by the judge or master, conditioned for the fulfilment of the order; or (d) that the person in default provide some other security for the payment of any amount required to be paid under the order.	
Coming into force 9 This Act comes into force on the day it receives royal assent.		

EXPLANATION PAPER:
THE MARITAL PROPERTY AMENDMENT ACT

The one amendment to The Marital Property Act would permit a judge to make an interim equalization payment or other interim orders under The Marital Property Act pending the disposition of the application for equalization.

This is necessary because of the lengthy delay involved in the more complicated applications for accounting and equalization. Some members of the Bench have pronounced interim orders pursuant to the existing Marital Property Act, but this amendment will clarify the jurisdiction to do so.

MARITAL PROPERTY AMENDMENT ACT

C.C.S.M. c. M45 amended

1 The Marital Property Act is amended by this Act.

Section 18.1 added

2 The following is added after section 18:

Interim Order

18(1) Pending the disposition of an application under this Act, the court may make such interim order as it considers necessary and reasonable for the proper application of the Act.

Conditions

18.1(2) An interim order may be made subject to any terms and conditions that the court considers appropriate.

Coming into force

3 This Act comes into force on royal assent.

COMMENTS

This new provision would permit a judge to make an interim equalization payment or other interim order, pending the disposition of the application for equalization.